United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6051

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
NO. 75-6051

REV. DONALD L. JACKSON,

Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA and
STATE OF NEW YORK,

Defendants-Appellees.

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P/S

BRIEF FOR DEFENDANT-APPELLEE STATE OF NEW YORK

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BRIEF FOR DEFENDANT-APPELLEE STATE OF NEW YORK

Statement

This is an appeal from an order of the United States District Court for the Western District of New York (CURTIN, J.) denying plaintiff's motion for a three-judge court and injunctive relief.

Nature of the Case

The plaintiff commenced this action against the State of New York and the United States of America in the United States District Court for the District of Columbia. Venue was changed to the Western District of New York on motion by the United States of America. The plaintiff apparently requests a declaratory judgment declaring Article VI, section 20, of the New York State

Constitution and New York Election Law, § 137, invalid as violating the United States Constitution. He also asks for injunctive relief to enforce such a decision and money damages.

Plaintiff bases jurisdiction on 28 U.S.C. § 1343 for violation of 42 U.S.C. 1981 et seq.*

The action was commenced in the District of Columbia. Upon motion of the United States of America venue was changed to the Western District of New York. While the action was still before the District Court for the District of Columbia, the State of New York moved to dismiss for lack of jurisdiction.** That Court changed venue without ruling on the motion to dismiss. The District Court for the Western District of New York has chosen not to rule on the motion to dismiss at this time (A 12).***

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* Numerous other Constitutional and statutory provisions are set forth in plaintiff's complaint, but 28 U.S.C. § 1343 would be the only one that confers jurisdiction.

** As appears more fully in the State's motion papers and memorandum in support of the motion, the State contested jurisdiction for failure to raise a substantial constitutional question; the bar of the Eleventh Amendment to the U. S. Constitution to a citizen suing his own State in Federal Court; that the State is not a person within the meaning of 42 U.S.C. § 1981 et seq.; the fact that plaintiff has four other actions pending in which he raised the same questions; and lack of territorial jurisdiction (SA 1).

*** Number refers to pages in the Appendix (A) or Supplemental Appendix (SA).

Plaintiff moved for the empanelling of a three-judge court to hear his case. That motion was denied by the District Court.

Decision of the Court Below

The District Court (CURTIN, J.) decided that the plaintiff was requesting injunctive relief against the operation and enforcement of Article VI, section 20, of the New York State Constitution and New York Election Law, § 137. The plaintiff requested that a three-judge court be convened.

The Court stated that there is no right to a three-judge court where the constitutional claim is insubstantial. The Court found that the constitutional challenge to Article VI, section 20, of the New York State Constitution was insubstantial. It stated that there was no federal right to run for or hold State elective office, citing Peterson v. Knutson, 367 F. Supp. 515, 517 (D. Minn., 1973).

The Court further found that this section did not involve a constitutionally offensive restriction upon access to the ballot. The Court stated that professional qualifications for a judicial position are not an invidious requirement.

With respect to plaintiff's challenge to New York Election Law, § 137, the Court found the constitutional challenge insubstantial. The Court stated that this section does not contain

an offensive scheme discriminating against one class of persons. The Court then stated that this section simply excludes judicial candidates from the requirement of party membership for the purposes of party nomination in a primary election.

Questions Presented

1. Was not the District Court correct in declining to convene a three-judge court since there is no showing of a substantial constitutional question?

The Court below declined to convene a three-judge court.

2. Is there jurisdiction in the federal courts to hear this claim?

The District Court did not reach this question.

State Constitution Section and Statute Involved

New York Constitution, Article VI, § 20:

> "§ 20. [Judicial office, qualifications and restrictions]
>
> "a. No person, other than one who holds such office at the effective date of this article, may assume the office of judge of the court of appeals, justice of the supreme court, or judge of the court of claims unless he has been admitted to practice law in this state at least ten years. No person, other than one who holds such office at the effective date of this article, may assume the office of judge of the county court, surrogate's court, family court, a court for the city of New York established pursuant to section fifteen of this article, district court or city court outside the city of New York unless he has been admitted to practice law in this state at least five years or such greater number of years as the legislature may determine.

"b. A judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of a county court, judge of the surrogate's court, judge of the family court or judge of a court for the city of New York established pursuant to section fifteen of this article who is elected or appointed after the effective date of this article may not:

"(1) hold any other public office or trust except member of a constitutional convention or member of the armed forces of the United States or of the state of New York in which latter event the legislature may enact such legislation as it deems appropriate to provide for a temporary judge or justice to serve during the period of the absence of such judge or justice in the armed forces;

"(2) be eligible to be a candidate for any public office other than judicial office or member of a constitutional convention, unless he resigns his judicial office; in the event a judge or justice does not so resign his judicial office within ten days after his acceptance of the nomination of such other office, his judicial office shall become vacant and the vacancy shall be filled in the manner provided in this article;

"(3) hold any office or assume the duties or exercise the powers of any office of any political organization or be a member of any governing or executive agency thereof;

"(4) engage in the practice of law, act as an arbitrator, referee or compensated mediator in any action or proceeding or matter or engage in the conduct of any other profession or business which interferes with the performance of his judicial duties.

"c. Qualifications for and restrictions upon the judges of district, town, village or city courts outside the city of New York, other than such qualifications and restrictions specifically set forth in subdivision a of this section, shall be prescribed by the legislature, provided, however, that the legislature shall require a course of training and education to be completed by justices of town and village courts selected after the effective date of this article who have not been admitted to practice law in this state."

New York Election Law, § 137:

"1. No petition for the purpose of designating any person as a candidate for party nomination at a primary election shall be valid unless the person so designated shall be enrolled as a member of the party referred to in said designating petition at the time of the filing of the petition.

"2. No nomination made by any committee of a political party shall be valid unless the person so nominated was enrolled as a member of such party at the time of the filing of the certificate of nomination, provided, however, that such restriction shall not apply to the nomination or designation of a candidate for statewide judicial office made by a state committee in the nomination procedure prescribed in section one hundred thirty-one.

"3. No party designation or nomination made by a committee to fill vacancies, and no party nomination made for an office to be filled at a special or general election by reason of vacancy existing in such office, shall be valid unless the person so designated or nominated shall be an enrolled member of the political party referred to in the certificate of substitution or of nomination at the time of the filing of such certificate.

"4. Notwithstanding the provisions of subdivision one, two and three of this section, at a meeting of the members of the party committee representing the political subdivision of the office for which a designation or nomination is to be made, or of such other committee as the rules of the party may provide, except as hereinafter in this subdivision provided with respect to certain offices in the city of New York, by a majority vote of those present at such meeting provided a quorum is present, such committee may authorize the designation or nomination of a person as candidate for any office who is not enrolled as a member of such party as provided in this section. In the event that such designation or nomination is for an office to be filled by all the voters of the city of New York, such authorization must be by a majority vote of those present at a joint meeting of the executive

committees of each of the county committees of the party within the city of New York, provided a quorum is present at such meeting. The authorization to file the designating petition, the certificate of nomination and the certificate of substitution shall be filed not later than four days after the last day to file such designating petition, certificate of nomination or certificate of substitution. The certificate of authorization shall be signed and acknowledged by the presiding officer and the secretary of the meeting at which such authorization was given.

"5. This section shall not be construed to apply to a political party designating or nominating candidates for the first time, nor to candidates for judicial offices."

ARGUMENT

POINT I

THE CONVENING OF A THREE-JUDGE COURT IS NOT WARRANTED WHERE THE PLAINTIFF FAILS TO RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

Where the issue presented is whether the plaintiff has raised a substantial constitutional question, the rule in Goosby v. Osser, 409 U.S. 512 (1973) is to be followed. The question here is whether the District Court properly determined that the constitutional grounds raised by the plaintiff were wholly insubstantial and frivolous. (Rubino v. Ghezzi, 512 F. 2d 431, 433 [2d Cir., 1975].)

Here the plaintiff alleges that the requirement that certain State judges be admitted to the practice of law for specified periods (N.Y. Constitution, Art. VI, § 20) violates his right to vote and his right to become a judge under the Fourteenth Amendment to the U. S. Constitution.

In addition plaintiff objects to New York Election Law, § 137, which excepts an incumbent candidate for judicial office from the requirement that he be a member of the party nominating him. It apparently is plaintiff's contention that this provision denies him equal protection because as a candidate for a non-judicial office he is required to be a member of the political party from which he seeks a nomination.*

In both instances plaintiff's constitutional objections are wholly insubstantial. The State has a legitimate interest in insuring that its judges are qualified. Requiring admission to the practice of law and requiring the admission to be for specified periods are both reasonably related to this State interest.

A State may regulate an occupation affecting the public interest by establishing qualifications which are reasonably related to insuring competency. (Dent v. West Virginia, 129

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* However, the exception from political party membership also applies to candidates seeking an office for the first time. Since plaintiff does not allege he is an incumbent in any office, this exception would seem to apply to him and he is not aggrieved by the statute.

U. S. 114 [1889]; Groves v. Minnesota, 272 U. S. 425, 428 [1926]; Williamson v. Lee Optical Co., 348 U. S. 483 [1955]; Kotch v. Board of River Pilots Commissioners, 330 U. S. 552 [1947].)

In addition a State has the power to impose reasonable eligibility requirements on those who seek public office. (Hadnott v. Amos, 320 F. Supp. 107, 119-123 [M.D., Ala. (1970) aff'd 401 U. S. 968]; Sununu v. Stark, 383 F. Supp. 1287 [N.H. (1974)].)

The underlying purpose of New York Election Law, § 137 is clear on its face. It permits partisan politics to be minimized and allows cross endorsement of incumbent judges. The State's legitimate interest in having experienced judges and in depoliticizing the selection process is served by this statute.

Where the plaintiff fails to show that the qualification imposed is unreasonable and arbitrary and that the statutory scheme is unreasonable and arbitrary, there is no federal right to run for or hold State elective office. (Peterson v. Hughes, 367 F. Supp. 515, 517 [D. Minn. (1973)].)

The unsoundness of plaintiff's contentions are clearly established by the foregoing decisions. Moreover, the "obviously frivolous"* nature of plaintiff's constitutional question is

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* Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 288 (1910).

further demonstrated by the fact that plaintiff previously attacked the constitutionality of Article VI, § 20 (N. Y. Constitution).* The prior action was brought in United States District Court for the Western District of New York and the State of New York was one of the named defendants. In dismissing the complaint, the District Court stated:

> "The New York constitutional requirement that candidates for judicial office be members of the bar is designed to provide the state with a qualified judiciary. Plaintiff has not alleged facts showing arbitrary or capricious action, or intentional or invidious discrimination by the state. The state requirement serves a useful legitimate state purpose. On these facts, the court finds that plaintiff has not stated a claim under the equal protection or due process clause of the fourteenth amendment. See McGowan v. Maryland, 366 U. S. 420, 461 (1961)" (SA 16).

The plaintiff appealed this dismissal but never perfected his appeal. The appeal was dismissed by this Court on June 24, 1975.

In view of the above-cited cases and the fact that plaintiff previously litigated this question, the District Court correctly found plaintiff's constitutional questions to be wholly insubstantial.

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* Rev. Donald L. Jackson v. City of Buffalo, County of Erie and State of New York, Civil Action Number 1971-478.

POINT II

THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

If on appeal it is found that the District Court lacked jurisdiction, the Court of Appeals may remand with instructions to dismiss. (United States v. Huss, ___ F. 2d ___ [2d Cir., No. 1248, July 25, 1975].) The failure to raise a substantial constitutional question warrants dismissal for lack of jurisdiction (Goosby v. Osser, supra at 518).

In addition plaintiff alleges violation of 42 U.S.C. § 1981 et seq. The complaint fails to state a claim under these sections because the State of New York is not a "person" within the meaning of this statute. (Monroe v. Pape, 365 U. S. 167, 191 [1961]; Sires v. Cole, 320 F. 2d 877 [9th Cir., 1963].)

Moreover, the Eleventh Amendment to the United States Constitution bars the plaintiff from suing his own state in Federal Court (Hans v. Louisiana, 134 U. S. 1 [1890]).

Accordingly, there was no jurisdiction in the District Court to hear the plaintiff's complaint.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED AND THE COMPLAINT SHOULD BE DISMISSED.

Dated: September 17, 1975

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Colleen Acker, being duly sworn, says:

I am over eighteen years of age and a Stenographer in the office of the Attorney General of the State of New York, attorney for the Deft.-Appellee herein.

On the 18th day of September 1975 I served the annexed Brief for Deft.-Appellee-State of N.Y. upon the ~~attorney~~ persons named below, by depositing two copies thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said ~~attorney~~ persons at the address es within the State respectively theretofore designated by them for that purpose as follows:

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Colleen Acker

Sworn to before me this
18th day of September 1975

JOHN E. SHEA
Notary Public, State of New York
No. 4509228
Qualified in Albany County
Commission Expires March 30, 19